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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-564

EDWARD VASSALLO,

Petitioner,

against

ARTHUR RUBIN, Warden of the Queens House of Detention for Men,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons Why Certiorari Should be Denied	3
Conclusion	5

TABLE OF CASES

Barker v. *Wingo*, 407 U.S. 514, 431 (1972)	4
Barnes v. *United States*, 412 U.S. 837, 846 n. 12 (1972)	5
Cupp v. *Naughten*, 414 U.S. 141, 149 (1973)	5
Donnelly v. *De Christoforo*, 416 U.S. 637, 642-643 (1974)	5
Griffin v. *California*, 380 U.S. 609 (1965)	5
Moore v. *Arizona*, 414 U.S. 25, 27 (1973)	4
Strunk v. *United States*, 412 U.S. 434 (1973)	4
United States v. *Gainey*, 380 U.S. 63, 70-71 (1965)	5

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Opinions Below

On June 13, 1974, the United States District Court for the Eastern District of New York (JUDD, J.) dismissed petitioner's application for a writ of habeas corpus. A copy of the unreported memorandum appears in Appendix C in the Petition for a Writ of Certiorari. On June 28, 1974 the District Court denied petitioner's application for a certificate of probable cause. On August 16, 1974 the United States Court of Appeals for the Second Circuit also denied petitioner's motion for a certificate of probable cause. Copies of these orders appear in Appendices B and A respectively in the Petition for Writ of Certiorari.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. § 1254(1).

Questions Presented

Does a contention as to denial of the right to a speedy trial raise a substantial constitutional issue where the first part of the delay was caused by the defendant's flight from the Court's jurisdiction and the second part of the delay was due to the People's difficulty in locating two essential witnesses, and where there is no claim that the defendant was prejudiced by the delay?

Does a contention as to violation of the privilege against self incrimination by a trial court's charge to a jury raise a substantial constitutional issue where there was no comment on petitioner's failure to testify, and where the instruction on the subject of flight could not properly be characterized as comment on petitioner's failure to take the stand, and where the trial court correctly instructed the jury on the defendant's right to remain silent?

Statement of the Case

On July 12, 1973, at a Term of the Supreme Court, Queens County, petitioner was sentenced to state prison for a maximum term of 12 years after being convicted of the crime of manslaughter in the first degree by the verdict of a jury. The judgment of conviction was affirmed 43 A D 2d 948, 351 N.Y.S. 2d 952. Application to appeal to the New York Court of Appeals was denied.

Petitioner's contentions as to denial of his right to a speedy trial, and violation of his privilege against self incrimination were rejected by the District Court after a review of the Record on Appeal in the state courts. The

material facts relating to these contentions are set forth in the Judge's opinion and they are reproduced here as follows:

The homicide occurred on October 20, 1968. A search for petitioner by a New York City detective was unsuccessful. On September 27, 1970 he was arrested in New Jersey for a traffic violation, and he showed a driver's license in another name. In June of 1971 he was arrested on the murder charge and he was returned to the jurisdiction of the New York courts. He was released on bail. Subsequently, the bail was exonerated and he was placed on parole. The case was set for trial on December 6, 1971 following disposition of defense motions. Further adjournments ensued over defendant's objections because of the District Attorney's inability to obtain the presence of two essential witnesses. On November 9, 1972 petitioner's motion to dismiss the indictment for lack of a speedy trial was granted unless the People were ready for trial by June 1, 1973. The Court found that the delay up to that date was adequately explained but that petitioner was prejudiced by the lack of a firm trial date.*

The court charged the jury concerning the presumption of innocence, the burden of proof, the fact that the defendant had no burden to prove his innocence, the defendant's right to remain silent and that no inference could be drawn from the defendant's failure to take the witness stand. On the subject of flight the Court charged that it might be considered as indicative of a consciousness of guilt "when unexplained by the defense or falsely explained."

Reasons Why Certiorari Should be Denied

I. Petitioner contends that he was denied his right to a speedy trial. The District Judge, after a review of the Record on Appeal in the state courts correctly rejected the

* The trial in fact commenced within the time limit imposed by the Court.

contention. The claim considered in the light of the facts disclosed by the record does not raise a substantial issue.

First, the delay from October 20, 1968, when petitioner committed the crime through June of 1971 when he was arrested for it was caused by his flight from the jurisdiction of the court. The delay during this period of time must be attributed solely to petitioner.

Secondly, the delay from June of 1971 when he was arrested in New Jersey through June 1, 1973 when the trial began, was due to the People's difficulty in locating two essential witnesses.* This was adequate justification for the delay. As it was stated in *Barker* v. *Wingo,* 407 U.S. 514, 531 (1972):

> "Closely related to the length of the delay is the reason the government assigns to justify the delay . . . a valid reason, such as a missing witness, should serve to justify appropriate delay."

See also *Strunk* v. *United States,* 412 U.S. 434 (1973).

Thirdly, prior to trial petitioner was released on bail and thereafter bail was exonerated and he was placed on parole. Petitioner does not claim that his defense was impaired by reason of the delay. The element of prejudice from the delay is absent here. See *Barker* v. *Wingo, supra,* p. 532; *Moore* v. *Arizona,* 414 U.S. 25, 27 (1973).

II. Petitioner contends that the judge's charge to the jury violated his privilege against self incrimination. The contention is unsupported by the record. As the District Judge noted, the trial court correctly instructed the jury on petitioner's right to remain silent and that no inference could be drawn from petitioner's failure to take the wit-

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* Petitioner's contention that the District Attorney made misrepresentations to the trial court with respect to the witnesses (Pet., pp. 11; 14) is without merit.

ness stand. In fact, there was no comment on petitioner's failure to testify. See *Griffin* v. *California,* 380 U.S. 609 (1965).

On the subject of flight the trial court charged that it might be considered as indicative of consciousness of guilt "when unexplained by the defense or falsely explained." As the District Judge noted, the court referred generally to the defense and not to the defendant himself. The instruction could not properly be characterized as comment on petitioner's failure to take the witness stand. See *Barnes* v. *United States,* 412 U.S. 837, 846, n. 12 (1972); *United States* v. *Gainey,* 380 U.S. 63, 70-71 (1965).

The Court correctly charged the jury concerning the presumption of innocence and the State's duty as to the burden of proof, and no issue of constitutional dimension arises here as to any undercutting of these instructions. See *Cupp* v. *Naughten,* 414 U.S. 141, 149 (1973); *Donnelly* v. *De Christoforo,* 416 U.S. 637, 642-643 (1974).

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York, December 4, 1974.

Respectfully submitted,

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